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No. 01-10374

D.C. No. CV-99-03082-CW

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER - PETITIONER
(Your Name)

vs.

JOHN E. POTTER, Postmaster General of the U.S. Postal Service; et al., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner agrees with the Respondent in that the petition should be granted, but not on the very narrow issue asserted in the Respondent's brief. "Whether the court of appeals erred in dismissing petitioner's complaint because it failed to allege specific facts establishing a prima facie case of discrimination on the basis of race, color, and gender, or of unlawful retaliation under Title VII, 42 U.S.C. 2000e et. seq." (Res. Br., Question Presented) Respondent's brief fails to address the magnitude of the issues involved in this matter. Petitioner, however, would like to address some points in Respondent's brief.

The Supreme Court case cited in the Respondent's brief , Swierkiewicz v. Sorema N.A., 122 S. Ct. 992 (2002) directly addresses two of the petitioner's issues in that Petitioner's Question No. 5. "Whether the District Court was justified in dismissing a discrimination complaint without providing the complainant with an opportunity to conduct meaningful discovery where the primary theory of discrimination is depended upon evidence from the employer to demonstrate motive and intent?" (Pet. Br. Question Presented No. 5) and Petitioner's Question No. 6. "Whether the District Court was justified in dismissing the retaliation claim when the discriminatory actions alleged demonstrate a cognizant pattern of disparate treatment used in conjunction with employment practices and policies that appeared neutral on their face?"

This Court held the following: "This Court has never indicated that the requirements for establishing a prima facie case under McDonnell Douglas also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role

of the pleadings." McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., Scheuer v. Rhodes, 416 U. S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See Trans World Airlines, Inc. v. Thurston, 469 U. S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending

on the context and were "never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U. S. 567, 577 (1978); see also McDonnell Douglas, supra, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); Teamsters v. United States, 431 U. S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); Ring v. First Interstate Mortgage, Inc., 984 F. 2d 924, 927 (CA8 1993) ("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U. S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See id., at 47-48; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U. S. 163, 168-169 (1993).

"The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure §1202, p. 76 (2d ed. 1990). Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34-40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Leatherman, supra, at 168. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer, 416 U. S., at 236."

As to the Respondent's argument that the Petitioner's complaint was properly dismissed pursuant to the District Court's Order seeking additional factual information, without lifting the stay on discovery as requested by the Petitioner, is also defeated by this Court's holdings in Swierkiewicz v. Sorema N.A., supra.

The remaining issues that the Petitioner has raised in his petition were best but partially addressed by this Court's recent decision in **National Railroad Passenger Corporation v. Morgan, No. 00-1614, Argued January 9, 2002, decided June 10, 2002, 2001-057.**

This Court's analogy in reaching its decision warrants the immediate attention of the Circuit and District Courts to: 1. Aid in the alignment of the Circuit and District Courts in recognizing systematic discrimination that is comprised of formal and informal policies practiced by an employer to select employees for harassment or dismissal for participating in the EEOC complaint process. (Pet. Br. Question Presented No. 1.); 2. Establish guidelines to align the Circuit and District Courts as to how to identify if systematic discrimination is being used by an employer to customize the workforce based upon discriminatory criteria that focuses on specific behavior characteristics of a specific racial group and exploitive gender criteria which adversely impacts individuals of specific racial groups who are less exploitable. (Pet. Br. Question Presented No. 2.); 3. To determine if the District Court is justified in using the criteria of filing a specific number of discrimination complaints against an employer as criteria for ordering a restrictive pre-filing order against an appellant without first considering factors concerning the effectiveness of the EEOC administrative process in resolving EEO complaints at the onset and without determining if the series of complaints filed constitute sufficient evidence of continuing violations of systematic discrimination practiced by the employer. (Pet. Br. Question Presented No. 3.);and 4. Define whether the Circuit and District Courts have a responsibility or duty to allow complainants the opportunity of meaningful and comprehensive discovery into their allegations of discrimination before dismissing their complaints after the Courts are apprised of the EEOC administrative process being compromised and/or rendered ineffective by the systematic failure of personnel of the EEOC administrative process to develop a comprehensive and complete record of the alleged discrimination by failing to interview witnesses for supporting affidavits and

being informed that management used tactics to create a hostile work environment to intimidate employees thereby causing fear of reprisal from management if they provided supportive declarations of discrimination claims to fellow employees. (Pet. Br. Question Presented No. 4).

FILING OF SUCCESSIVE EEO COMPLAINTS REFLECTIVE OF HOSTILE WORK ENVIRONMENT

1. Filing of EEO Charges are Mandatory

This Court has held that the best approach to resolving the question of whether an EEO complaint should be filed pursuant to a multiple or single "unlawful discriminatory act" would best be addressed by strict adherence to the statute governing the filing of EEO complaints under 42 § 5000(e)1, which specifies that "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*"

This Court reasoned:

"The Courts of Appeals have taken various approaches to the question whether acts that fall outside of the statutory time period for filing charges set forth in 42 U.S.C. § 2000e-5(e) are actionable under Title VII.. While the lower courts have offered reasonable albeit divergent solutions, none is compelled by the text of the statute. In the context of a request to alter the timely filing requirements of Title VII, this Court has stated that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980). In *Mohasco,* the Court rejected arguments that strict adherence to a similar statutory time restriction for filing a charge was "unfair" or that "a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies." *Id.* at 824-825. Instead, the Court noted that [b]y choosing

what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. *Id.* at 825. Similarly here, our most salient source for guidance is the statutory text. (Footnotes omitted)

Title 42 U.S.C. § 2000e-5(e)(1) is a charge filing provision that "specifies with precision" the prerequisites that a plaintiff must satisfy before filing suit. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days. A claim is time-barred if it is not filed within these time limits.

For our purposes, the critical sentence of the charge filing provision is: "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*" § 2000e-5(e)(1) (emphasis added). The operative terms are "shall," "after . . . occurred," and "unlawful employment practice." "[S]hall" makes the act of filing a charge within the specified time period mandatory. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion"). "[O]ccurred" means that the practice took place or happened in the past. The requirement, therefore, that the charge be filed "after" the practice "occurred" tells us that a litigant has up to 180 or 300 days *after* the unlawful practice happened to file a charge with the EEOC. (Footnotes omitted)

The critical questions, then, are what constitutes an "unlawful employment practice" and when has that practice "occurred"? Our task is to answer these questions for both discrete discriminatory acts and hostile work environment claims. The answer varies with the practice."

2. Hostile Environment Consist Of Numerous Acts Over Extensive Period Of Time

This Court held in its decision in the Matter of **National Railroad Passenger Corporation v. Morgan,** supra, that a hostile environment claims are "different in kind from disparate acts. There very nature involves repeated conduct.. *See* 1 B. Lindemann & P. Grossman, Employment Discrimination Law 348-349 (3d ed. 1996) (hereinafter Lindemann) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence"). The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("As we pointed out in *Meritor [Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986),] `mere utterance of an . . . epithet which engenders offensive feelings in a employee,' *ibid.* (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII"). Such claims are based on the cumulative affect of individual acts.

We have repeatedly made clear that although [Title VII} mentions specific employment decisions with immediate consequence, the scope of the prohibition "is no limited to 'economic' or 'tangible' discrimination, " *Harris,* [510 U.S. at 21] (quoting *Meritor Savings Bank, FSB v. Vinson,* [477 U.S.] at 64), and that it covers more than

"terms" and "conditions" in the narrow contractual sense. *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998)). As the Court stated in *Harris*, 510 U.S. at 21 (some internal quotation marks omitted) (quoting *Meritor*, 477 U.S. at 64, in turn quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)). "Workplace conduct is not measured in isolation. . . ."*Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam). Thus, *Harris*, 510 U.S. at 21 (internal citations omitted).

> In determining whether an actionable hostile work environment claim exists, we look to "all the circumstances," including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. at 23. To assess whether a court may, for the purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, we again look to the statute. It provides that a charge must be filed within 180 or 300 days "after the alleged unlawful employment practice occurred." A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

That act need not, however, be the last act. As long as the employer has engaged in

enough activity to make out an actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole.

It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days "after" the single unlawful practice "occurred." Given, therefore, that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."

Cognitive Claim Of Hostile Environment Established

In accordance to this Court's holding in **National Railroad Passenger Corporation v. Morgan,** supra, a hostile environment claim can be established through previous alleged discriminatory actions outside the statutory time period for the purpose of assessing liability as long as any act contributing to the hostile environment claim takes place during the statutory time period.

This Court concluded that to establish a claim for a hostile environment may span

days or even years.

Pursuant to this Court's reasoning, Petitioner may form the basis of establishing a "hostile environment" claim. For example, Petitioner began employment with the Postal Service in June, 1991. (FAC pg 2 ¶ 9) Petitioned filed a EEO complaint against a Afro-American female supervisor for calling him a "dumb ass man, stupid and creating a unacceptable and intolerable workplace. (Pet. Br. B4) (Res. App. B. FAC ¶ ¶ 34 and 154) The Circuit and District Courts found that the discriminatory acts complained of were not sufficiently offensive or pervasive enough pursuant to Harris v. Forklift Systems, Inc., supra.

A discriminatory act was not established, however, the event should be considered of such an offensive nature that it would create an atmosphere of tension and suspicion. Coupled to the unsettled atmosphere, was apprehension as to why the Postmaster of the facility had elected not to offer corrective action or respond to the allegations that the Petitioner was being addressed in a demeaning fashion and harassed. Equally suspect and suspicious was the Postal Service election not to investigate the Petitioners claims of discrimination until the matter was remanded back to the Postal Service by the Office of Federal Operations on June 22, 1995 (Pet. Br. B4) (Res. App. B FAC ¶ ¶ 155 and 156) There is also the appearance that the Postmaster condoned and encouraged the female supervisor to behave in an abusive and unprofessional fashion. (Res. App. B. FAC ¶125)

The acts complained of by the Petitioner created a hostile environment whereby each individual act appeared to be retaliatory in nature. (Res. App. B. FAC ¶ ¶ 125 through 133, 146,159, 172 and 173)

Vexatious Litigant Claim Addressed

The Respondent asserts in his brief that the Petitioner has a long history of repetitious vexatious litigation against the Postal Service. (Res. Br. Pg. 9 para. 1) Petitioner strongly objects to the Respondent's characterization. If in fact the EEOC administrative process were functional in addressing EEO complaints in a timely and effective fashion and the EEOC investigative body was thorough in conducting its investigation, the Petitioner would have no need to file any complaints of discrimination in the judicial system. If in fact the Petitioner were given respect as he had given to others, there would be no cause to address any violations of his civil rights.

Following the Office of Federal Operations remand of the Petitioner's complaint for investigation, the Petitioner has had to file an addition of five EEO complaints addressing what appeared to be disparate treatment and retaliatory acts and two tort actions for what appeared to be a blatant failure of Postal Service to address basic human rights. (Res. Br. Pg 9 para. 1)

Respondent's points out that "not one court has found any merit to any of petitioner's claims. Petitioner has had only one complaint go to trial and that particular case was the only case that the EEO investigator did a good job in terms of obtaining evidence, i.e. affidavits, excerpts of pertinent manuals, evaluation records, etc.. Subsequently a complaint was filed in the District Court.

Discover was extremely limited to the point whereby the petitioner could not obtain information from the Postal Service to demonstrate their explanation for using specific job experience criteria that was not in the job announcement or job requirements for selecting candidates for a electronic position was pre-textual and unnecessary. The

matter was decided in favor of the Postal Service. (Res. Br. App. A20, para. 1)

The Petitioner has had to file EEO complaints to address the many flagrant discriminatory acts as best he could under the present ineffective conditions of the EEO Investigative body and EEO administrative process. Upon obtaining right to sue letters, the Petitioner has had to address the very limited or in most cases, no discovery situations presented to him by the District Court.

Petitioner has attempted to hire an attorney at the first onset of what appeared to be discriminatory acts. Of the attorneys that appeared to be qualified to address the matter, non wanted to deal with the Postal Service. There were approximately three that the Petitioner located that would be willing to represent the Petitioner, but all wanted extremely high retainer fees up front. Non of the attorneys stated that the Petitioner's case did not have merit.

Petitioner made several request to the District Courts for an appointment of counsel citing an extensive search and the lack of success. The Petitioner's request was denied in each instance.

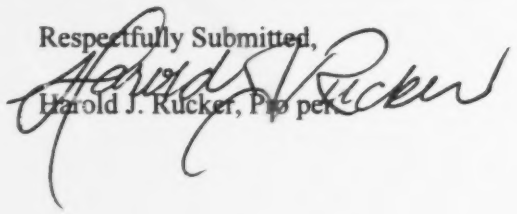
Petition is not an attorney, however, he tries to address adverse situations that present themselves in his life with the resources available to him. If addressing any adverse action requires that the Petitioner pursue the matter in Court, then it shall be pursued in Court. Respondent gives the impression that the Petitioner should not address any wrongs that he perceives by bringing civil action in the appropriate courts.

Petitioner recognizes that there has been a stigma associated with and a prejudice against lay persons who attempt to address their own legal rights for an inordinate amount of time. It's time for a change.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully Submitted,



Harold J. Rucker, Pro per

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PROOF OF SERVICE

I HAROLD J. RUCKER, do swear or declare that on this date, October 2, 20 02, as required by Supreme Court Rule 29 I have served the enclosed PETITIONER'S REPLY BRIEF on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States	United States Attorney
Depatement of Justice, Rm 5614	Attn: Jocelyn Burton
950 Pennsylvania Ave., N.W.	450 Golden Gate Avenue, 10th Floor
Washington, D.C. 20530-0001	San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 20 02

Harold J. Rucker
(Signature)